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No. 06-643

# In the Supreme Court of the United States

STACEY MILLER,

*Petitioner*,

v.

UNITED STATES OF AMERICA

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF OF *AMICUS CURIAE* CHICAGO COUNCIL OF LAWYERS IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether a federal court of appeals' failure to allow oral argument, over the objection of one of the three panel members, violates the unanimity requirement of Federal Rule of Appellate Procedure 34(a)(2).

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# BRIEF OF CHICAGO COUNCIL OF LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

## INTEREST OF THE *AMICUS CURIAE*

The Chicago Council of Lawyers ("Council") is a non-partisan, public interest bar association comprised of approximately 1200 attorneys from all sectors of the profession. Established in 1969, it is dedicated to improving the quality of justice in the legal system and encouraging the fair and efficient administration of justice in the Chicago area. The Council works to make the justice system more effective, to promote accountability and equity in the law, and to ensure equal justice for every individual, regardless of social status.[1]

The Council seeks to achieve these goals in several ways. The Council studies and suggests improvements to local legal institutions and programs, such as the public defender's office and county processes for the collection of child support payments. The Council also analyzes and critiques the performance of judges and courts in the Chicago area. This work includes candid evaluations of candidates running for judicial office, state court judges, and federal district and appellate judges sitting in Chicago. See, *e.g.*, the "Federal Judicial Evaluations" section on the Council's website, www.chicagcouncil.org. In addition, the Council monitors local court operations, including those of the U.S. Court of Appeals for the Seventh Circuit, and suggests procedural improvements. See, *e.g.*, *Statement of the Chicago Council of Lawyers to the Commission on Structural Alternatives for the Federal Courts of Appeal* (Apr. 3,

[1] Pursuant to S. Ct. Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

1998).[2] Finally, the Council works with other groups to protect individual liberties and civil rights by urging appropriate reforms and, in select cases, participating in litigation.

The Council's members share a strong belief in the need for candid and informed analysis in proposing solutions to problems that hamper the proper functioning of our legal institutions. Consistent with that mission, the Council urges the Court to review the Seventh Circuit's failure to adhere to the unanimity rule set forth in Fed. R. App. P. 34(a)(2) when it failed to permit oral argument on petitioner's appeal.

## SUMMARY OF ARGUMENT

This case involves an improper denial of a party's right to be heard at oral argument. In the name of efficiency, the number of oral arguments has been steadily declining for years. To assure that such efficiency concerns do not trump a party's right to be heard on appeal, Congress mandated that oral argument "must be allowed in every case" unless the panel unanimously agrees that it would serve no purpose. Fed. R. App. P. 34(a)(2).

The Petition provides the Court with an ideal opportunity to ensure that the courts of appeals follow that mandate. Because of a published dissent, the record in this case plainly shows that the panel below did not unanimously agree to dispense with oral argument. Yet, the panel majority refused to allow oral argument, in plain contravention of Rule 34(a)(2).

That refusal is particularly disturbing because substantial liberty interests are at stake in this case. Petitioner faces a long prison sentence based on a trial at which, the record suggests, he was deprived of a fair opportunity to present a defense of innocence. On post-conviction review, his appointed appellate counsel was denied the opportunity to

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[2] www.ChicagoCouncil.org/projects/fd_evaluations/council.htm.

present oral argument, even though one member of the Seventh Circuit panel believed such argument was warranted. This was not an oversight. When the Rule 34(a)(2) violation was called to the court of appeals' attention in a request for rehearing, the court still refused to allow oral argument despite the lack of unanimity on the panel. This Court should grant the Petition, reverse, and remand with instructions to allow oral argument before reaching a decision on petitioner's appeal from denial of his post-conviction petition for review.

## ARGUMENT

### I. The Court Should Grant The Petition To Ensure That The Courts Of Appeals Give Effect To The Unanimity Provision In Rule 34(a)(2).

The Petition presents a rare opportunity for the Court to address one aspect of a growing problem: the steady erosion of the parties' right to present oral argument in the federal courts of appeals.

This Court has long held that "in some situations [oral] argument is essential to a fair hearing." *FCC* v. *WJR, the Goodwill Station Inc.*, 337 U.S. 265, 275 (1949). The Court also recognized that, in other situations, oral argument may not be necessary. Thus, "the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances" *Id.* at 276. Congress subsequently adopted a rule recognizing and protecting the importance of oral argument by erecting a procedural obstacle that must be overcome before oral argument may be scuttled. That Congressional mandate is found in Rule 34(a)(2) in the Federal Rules of Appellate Procedure.

Rule 34(a)(2) guarantees that a party may present oral argument if any panel member believes such argument is warranted. It provides:: "Oral argument *must* be allowed in every case unless a panel of three judges * * * *unanimously*

agrees that oral argument is unnecessary * * *" (emphasis added). The unanimity requirement in Rule 34(a)(2) is unambiguous and unqualified, reflecting the decisive view of Congress on this question as one of the mandated minimal levels of process to which a litigant is entitled in the federal appellate courts.

For at least the first half of the twentieth century, most parties in the federal circuit courts had the right to submit briefs in support of their position, to present oral argument explaining the issues to the panel assigned to hear the case, and to receive an opinion explaining the reasons for the panel's decision. See COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, Final Report, at 13-25, 70 (Dec. 18, 1998); William R. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 274 (1996); Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 Fla. St. U. L. Rev. 913, 952 (1995). The last fifty years, however, has seen an erosion of these procedural rights. This erosion is reflected in the steadily increasing number of cases decided in summary, unpublished, or non-precedential opinions, often without the benefit of oral argument.

Indeed, the incidence of federal appellate cases decided without oral argument has increased dramatically. In 1950, virtually all federal appeals were resolved only after oral argument. Baker, *supra*, note 13. The trend away from oral argument began in the 1970s in response to rising case loads. Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 Ohio State L.J. 1385, 1388-1389 (1990). Studies show that, by 1975, the percentage of federal appeals with oral argument had fallen to roughly 70% and continued to fall to 56% in 1985, 40% in 1997, and 30% in 2005. See Joe S. Cecil and Donna Stienstra, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS

OF APPEALS, Federal Judicial Center Report, Section I, Table 1 (1987); William T. Rule & Jeffrey Jackson, *After the Split – The Recent Workload of the Court of Appeals for the Fifth Judicial Circuit*, 14 Miss. C. L. Rev. 281, 300 (1994); 1998 Commission Report, *supra*, at 22, Table 2-6; Judicial Facts and Figures, Table 2.2.[3]

To be sure, there are conflicting views over the significance of this dramatic decline in oral argument opportunities. Some judges and academics deny any significant impact on the quality of justice or regard this decline as necessary to achieve greater efficiencies in the face of a growing caseload. *E.g.*, Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1 (1986); 1998 Commission Report, *supra*, at 21-25. But others believe that the declining number of cases in which oral argument is permitted threatens to seriously undermine the quality of justice dispensed by the federal courts of appeals. See Richman and Reynolds, *supra*, at 279-281, 294-297; Merritt, *supra*, at 1388-1390; 1397; Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35 (1986).

It is important to recognize that Congress was well aware of such differing views when it adopted Rule 34(a)(2). In the mid-1970s, various federal circuits were experimenting with a variety of procedures to curtail or eliminate oral argument, and changes to the appellate rules of procedure were being proposed to authorize or limit those experiments. See Commission On Revision Of The Federal Court

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[3] http://www.uscourts.gov/judicialfactsfigures/Table202.pdf. For the comparable 1997 figure with pro se cases excluded, see 1998 Commission Report, *supra*, at 22, Table 2-6; for an alternative 1990 estimate excluding jurisdictional defect cases, pro se cases and cases in which parties waived oral argument, see Merritt, *supra*, at 1388.

Appellate System, *Structure And Internal Procedures: Recommendations For Change*, 67 F.R.D. 195, 254-255 (1975) (recognizing the importance of oral argument by recommending a rule that evolved into Rule 34(a)(2)). In 1979, after hearing extensively from interested parties and observers, Congress decided to adopt the unanimity requirement set forth in Rule 34(a)(2), thereby creating a significant obstacle to dispensing with oral argument on appeal. Strict compliance with that requirement thus both gives effect to the will of Congress and helps ensure that the courts of appeals have the full benefit of the parties' views when resolving issues on appeal. *Id.*

## II. Only This Court Can Assure That Rule 34(a)(2) Remains An Important Bulwark Against The Erosion Of Parties' Procedural Rights On Appeal.

Notwithstanding the adoption of Rule 34(a)(2) in 1979, the number of cases resolved by the federal circuits without oral argument has continued to increase. See *supra*, p. 4. Moreover, the likelihood of oral argument varies considerably among the circuits. See 1998 Commission Report, *supra*, at 22, Table 2-6; *Merritt*, *supra*, at 1388. These differences suggest a continuing resistance among some court of appeals judges to the presumption in favor of oral argument reflected in Rule 34(a)(2).

Cases like this, where a judge formally dissents from a refusal to permit oral argument, are relatively unusual. See Pet. 13 (citing cases). However, it is reasonable to infer that for every case in which there is a formal dissent, there are many more cases in which a panel judge disagrees with the other panel members' refusal to allow oral argument but decides not to go public with his or her views. Thus, the question presented is not one unique to this case but rather involves an important issue that affects all the circuit courts and that only this Court can resolve.

Moreover, the fact that the Seventh Circuit denied petitioner's rehearing petition, which pinpointed the panel majority's plain violation of Rule 34(a)(2), suggests that some appellate judges may regard that rule as nothing more than "words on paper" that they may freely ignore. Such an impression creates a serious risk of undermining the public's perception of judicial respect for the rule of law.

This Court, in the exercise of its supervisory powers over the federal courts, can redress that misperception by insisting that the courts of appeals adhere to Rule 34(a)(2) and allow oral argument unless *all* judges on the panel agree that it is unnecessary.

## III. Enforcement Of Rule 34(a)(2) Is Especially Important In Cases Involving Substantial Prison Sentences.

The right protected by Rule 34(a)(2) is not inconsequential. Studies have shown that oral argument often affects the disposition of a case and may be "determinative of the outcome." S. Wasby, S. Peterson, J. Schubert & G. Schubert, *The Supreme Court's Use of Per Curiam Dispositions: The Connection to Oral Argument*, 13 N. Ill. U. L. Rev. 1, 30 (1992). As Justice Rehnquist attested, "in a significant minority of the cases in which I have heard oral argument, I have left the bench feeling different about the case than I did when I came on the bench." Chief Justice Rehnquist, THE SUPREME COURT 276 (1987). Justice Brennan agreed, noting that "oral argument is the absolutely indispensable ingredient of appellate advocacy." Justice Brennan, quoted in Harvard Law School Occasional Pamphlet No. 9, at 22-23 (1967).

Lack of oral argument also can be dispositive. Commentators, including former federal appellate judges, have noted that "nonargued cases almost invariably result in an affirmance of the district court's decision." Bright, *supra*, at 43. "By decreasing oral argument, we upset the balance,

unconsciously increase the authority of our staff, and risk hasty decisions directed by the judgments of others." Merritt, *supra*, at 1392. It is not surprising, then, that "cases not argued are 'affirmed at a greater rate than cases in which argument occurs' and 'cases not argued are much less likely to be decided with a published opinion.'" Richman & Reynolds, *supra*, at 280-281; see also Baker, *supra*, at 917. Courts should be particularly wary of increasing the risk of error and injustice in cases like this, where a claim of actual innocence is being asserted and the effect may be wrongful and lengthy incarceration. The Seventh Circuit's treatment of its Rule 34(a)(2) obligation strongly suggests that the appropriate level of vigilance is *not* being maintained.

It bears emphasizing that this is a case in which petitioner (1) was initially identified using a questionable photo identification procedure, (2) was denied, due to inadequate representation by his initial trial counsel, the opportunity to call witnesses in support of his contention that he was in a different city when the crime in question occurred, (3) was represented at trial by substitute counsel who admittedly was inadequately prepared, and (4) had to prepare and file pro se the one substantive *habeas corpus* petition to which he is entitled under 28 U.S.C. § 2255. See Pet. 2-8. Even after appointed appellate counsel raised arguments about the inadequacy of petitioner's trial counsel, to which the district court opinion did not respond (see Pet. 18a), two members of the Seventh Circuit panel refused to permit oral argument without any explanation. Petitioner's subsequent request for rehearing expressly raising the panel's failure to follow Rule 34(a)(2) also was denied without explanation. A person facing a prison sentence in excess of 30 years for alleged involvement in relatively small drug transactions deserves more careful consideration of his arguments on appeal than he obtained here.

Even if the panel's initial failure to permit oral argument, despite the lack of unanimous agreement required

by Rule 34(a)(2), resulted from carelessness, the Seventh Circuit's failure to order rehearing indicates either deficiencies in its internal operating procedures or a failure to recognize the importance of complying with the Rule 34(a)(2) unanimity mandate. Either way, this case, which involves substantial liberty interests, presents an ideal opportunity to remind both the Seventh Circuit, and the courts of appeals as a whole, that oral argument is an important part of the appellate process that *cannot* be dispensed with unless the panel hearing the case unanimously agrees.

## CONCLUSION

The Petition should be granted and the judgment of the Seventh Circuit reversed.

Respectfully submitted.

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